IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.836 OF 2007
IN
SUIT NO.592 OF 2007

Shakil Meer Khan ....Plaintiff
V/s.
Probal S. Ray & Anr. ....Defendants

Mr.Arun H. Palekar with Mr.R.R. Jaiswal for the Plaintiff.

Mr.Yashodharan Sakhare for Defendant No.1

Mr.S.M. Dange for Defendant No.2.

WITH

NOTICE OF MOTION NO.1556 OF 2007
IN
SUIT NO.1183 OF 2007

Probal S. Ray ....Plaintiff
V/s.
Bina S. Ray & Anr. ....Defendants

Mr.Yashodharan Sakhare for the Plaintiff.

Mr.S.M. Dange for Defendant No.1.

Mr.Arun H. Palekar with Mr.R.R. Jaiswal for Defendant No.2.

CORAM : S.J. VAZIFDAR, J.
DATED : 3RD SEPTEMBER, 2007.

ORAL JUDGMENT :

1. Both the Notices of Motion are disposed of by

a common order as the subject matter of both the suits is the same and the disputes between the parties in both the suits are similar and raise common questions of fact and law.

2. The Plaintiff and Defendant Nos.1 and 2 in Suit No.1183 of 2007 are Defendant No.1, Defendant No.2 and the Plaintiff respectively in Suit No.592 of 2007.

3. For convenience I will refer to facts and the parties as arrayed in Suit No.1183 of 2007.

4. Defendant No.1 is the mother of the Plaintiff in Suit No.1183 of 2007. Defendant No.2 i.e. the Plaintiff in Suit No.592 of 2007 is a third party to whom Defendant No.1 sold the suit flat.

5. Defendant No.2 filed Suit No.592 of 2007 prior to Suit No.1183 of 2007. In Suit No.592 of 2007, Defendant No.2 has sought an order directing the Plaintiff to hand over possession of the suit flat against the payment of Rs.36,25,000/- being his 50% share in terms of an order dated 14.10.2003 passed by the learned Judge in Suit No.6895 of 2002 filed in the Bombay City Civil Court. In the alternative,

Defendant No.2 has sought a declaration that a portion of the suit flat in his possession falls to his share and the same be transferred to his name by the Plaintiff in Suit No.1183 of 2007. It is further prayed that the flat be partitioned and divided by meets and bounds and 50% thereof be given to Defendant No.2. Defendant No.2 has also prayed for an order permanently restraining the Plaintiff from selling, transferring etc. the portion of the flat in his possession except to Defendant No.2 and for a permanent injunction restraining the Plaintiff from disturbing the possession of Defendant No.2 of the suit flat.

6. Suit No.1183 of 2007 is filed for a declaration that the possession of Defendant No.2 of a portion of the flat in his possession is illegal ; for an order directing Defendant No.2 to hand over the physical possession thereof to the Plaintiff ; for a perpetual injunction restraining Defendant No.2 from entering the flat and for an order that upon possession being restored, Defendant No.1 be ordered not to part with possession of the flat to any third party. The Plaintiff has also sought an order restraining Defendant No.2 from parting with possession of the suit flat or from creating any third

party rights therein and from using the same for commercial purposes.

. The Plaintiff has filed Notice of Motion No.1156 of 2007 inter-alia for the appointment of a Court Receiver and for an injunction and other interim reliefs in terms of the final reliefs I have referred to.

7. By an order passed today,I have allowed Chamber Summons No.1323 of 2004 for amendment. I will presume that the interim reliefs claimed in the Notice of Motion also stand amended accordingly. One of the amendments is the addition of prayer (aa) declaring the agreement entered into between the Defendants as null and void and for an order directing Defendant No.2 to hand over vacant and peaceful possession of the portion of the flat in his possession to the Plaintiff. Interim reliefs in these terms have also been sought in the Notice of Motion.

8. There is no dispute that the suit flat belonged to the Plaintiff’s father i.e. the first Defendant’s husband who expired on 19.5.2001.

9. On 22.6.2001, the Plaintiff addressed a

letter to the society stating that his father had died intestate and requested the society not to transfer the share certificate to any other persons without his knowledge or permission. The Plaintiff also stated that he was aware that his mother/Defendant No.1 was trying to sell the flat and that the society ought not to recognize such transfer without notice to him. A similar letter was also addressed on 18.9.2002.

10. By a letter dated 29.11.2002, the society informed the Plaintiff that based on the nomination made by his father the share certificate had been transferred in the name of his mother.

11. The Plaintiff therefore filed S.C. Suit No.6895 of 2002 in the Bombay City Civil Court against Defendant No.1 and the society for an order restraining them from dispossessing him and/or disposing of the suit flat and from transferring the share certificate.

12. Notice of Motion No.225 of 2003, taken out by the Plaintiff in the said Suit was disposed of by an order dated 14.10.2005. The learned Judge observed that the Plaintiff and Defendant No.1 are equally entitled to the suit flat ; that neither the

Plaintiff nor Defendant No.1 has higher rights and that neither can dispossess the other from the suit flat until it is sold. There is no dispute in this regard.

13. However, the learned Judge also observed that both parties are equally entitled to sell or transfer the suit flat provided they give an equal half share to the other. The learned Judge further accepted the statement on behalf of Defendant No.1 that if she transferred the suit flat, she would give the Plaintiff his half share of the sale proceeds. By the said order, the learned Judge has disposed of not only the Notice of Motion but the suit as well.

14. With respect, this approach and view cannot be sustained. A co-owner is not entitled to sell the entire property unilaterally. At the highest, a co-owner is entitled to sell his or her undivided share in the property. One co-owner does not have a right in the absence of anything to the contrary, to sell or deal with the share of the other co-owners. The Plaintiff has an independent right. Suffice it to state that in the absence of anything else, Defendant No.1 would not be entitled to sell the Plaintiff’s half share in the suit flat or to bind the same

unilaterally. If the learned Judge's view is to be accepted even the Plaintiff would have a right to sell the entire flat including his mother's share without her consent so long as he protects her half share of the sale proceeds. There would be conflicting claims even by the purchasers.

15 (A). The Plaintiff filed a dispute under Section 23 of the Maharashtra Co-operative Societies Act for having his name added as a joint member of the society. This it was agreed is the effect of the application which is in Marathi.

(B). By an order dated 28.12.2004, the Plaintiff's name was ordered to be added as a joint member of the society. I am informed that the Revision Application filed by Defendant No.1 before the Joint Registrar, Co-operative Societies against the said order is pending.

16 (A). By a letter dated 2.6.2005, addressed to the Plaintiff, the first Defendant's advocate stated that Defendant No.1 had been negotiating the sale and transfer of her half share in the flat and that she has received an offer of Rs.25,00,000/- for the same. Defendant No.1 offered to sell her half share to the

Plaintiff at that price. It was further stated that if the Plaintiff failed to exercise the option to purchase the first Defendant's share within fifteen days, she would sell her half share to the prospective purchaser. It is pertinent to note that Defendant No.1 has admitted that the suit flat is a dwelling unit.

(B). By his letter dated 8.6.2005, Defendant No.1 declined the above offer. In any event, he did not respondent to it positively.

17. Admittedly, Defendant No.1 filed an application before the Co-operative Court seeking sanction for sale of the suit flat at the price of Rs.50,00,000/-. The application is not on record. The learned counsel however, state that the application was rejected.

18. In view of the above, the Plaintiff filed a dispute before the Second Co-operative Court being dispute No.CC/II/97/2005 for a declaration that the flat is a dwelling house and for other reliefs.

19. Defendant No.1 challenged the order dismissing her application seeking sanction of the

sale of the flat at Rs.50,00,000/- by filing Writ Petition No.3276 of 2006 in this Court. The same was disposed of by an order dated 7.6.2006. The Co-operative Court was directed to decide dispute No.97 of 2005 filed by the Plaintiff as expeditiously as possible. Interim relief was granted in terms of prayer (c), which reads as under :-

> "(c). The Petitioner be allowed to construct a wall in the passage connecting the two bed-room and the hall and allow the Petitioner to exclusively use, occupy and enjoy the portion marked "A" consisting of one bed room, hall and balcony and the remaining half portion consisting of two bed rooms,kitchen, bathrooms and balcony as marked "B" may be used by the Respondent No.1 and the family exclusively."

20. Pursuant to the order of this Court dated 7.6.2006, the wall was constructed and two separate units were created as an interim measure. Admittedly again this position continues to date.

21. Thereafter by an order dated 3.1.2007, the said dispute No.97 of 2005 was disposed of. The only relief that was granted was an order directing the society to follow the due procedure of law and make necessary entries in respect of the membership of the Plaintiff in the record including the share

certificate. The other prayers were not granted.

22. There were several serious and unfortunate disputes between the Plaintiff and and his mother, Defendant No.1. It is not necessary to set out the nature of the disputes. Suffice it to state that Defendant No.1 has alleged harassment and cruelty by the Plaintiff towards her. Defendant No.1 is today 83 years old.

23. In the meantime the disputes regarding the said flat were sought to be settled between the Plaintiff and Defendant No.1. The Plaintiff addressed a letter dated 13.6.2006 to Defendant No.1. It is essentially on the basis of this letter that I have declined to pass an order in the Plaintiff's favour. It is therefore necessary to set out this letter in extenso, which reads as under :-

13th June 2006

To,
Mrs.BINA RAY .
F/1, SHREE TRIMURTI .
KHAR (W), MUMBAI-52. .

Further to my consent that I am prepared to sell the flat no.1 I agree hereby to the following terms as agreed between myself and my mother (BINA RAY).

These terms have been finalised in the presence of society committee members :

1. MR. B. HOSANGADI (CHAIRMAN) .
2. MR. H. TOTLANI (SECRETARY)
3. V. ANGRISH (TREASURER)

1. That I have agreed to the price of Rs.72,50,000/- as offered by the society (SHREE TRIMURTI CHS).

2. I am entitled to 50% share of Rs.72.5 lakhs and on receipt of the same I will vacate my unit of the premises of the society.

3. The amount of Rs.7,25,000/- shall be received from the society as token money will be shared on 50 : 50 basis.

4. The balance amount of the total price will be received within next 15 days which will be shared on 50 : 50 basis.

5. In addition to the aforesaid amount the society shall pay me Rs.1,25,000/- to make my share of the proceeds to Rs.37,50,000/- (Rs.37.5 lakhs).

6. Each of us that is MR. PROBAL B. RAY and MRS.BINA RAY shall vacate the premises completely and each of us will be at liberty to live separately of their own choices. (emphasis supplied)

Thanking you,

Yours faithfully,

* Please pay me directly.

(Probal Ray)"

24. The said agreement dated 17.1.2007 which has been impugned by the Plaintiff in Suit No.1183 of 2007 was entered into between the Defendants. Under this agreement, Defendant No.1 has purported to sell the entire flat to Defendant No.2 for an aggregate sum of

Rs.72,50,000/-. Clauses 1, 2 and 3 of the agreement read as under :-

> "1) The Vendor declares that she is entitled to sell, transfer her right title and interest in Flat No.1, Ground Floor, Shree Trimurthi Cooperative Housing Society Ltd., 17th Khar Road,Khar (West), Mumbai-400 052 admeasuring 1160 sq.ft. (carpet area) together with 400 shares of Rs.50/- each, by virtue of the City Civil Court's order dated 14/10/2003 in Suit No.6895 of 2002 and the Consent letter dated 13/6/2006 from Mr.Probal Ray to sell the flat for Rs.72.50 lakh AND WHEREAS in pursuance of the said Agreement for Sale, I have.
>
> 2) The Vendor agrees to handover peaceful and vacant possession of Portion 1/A of the said Flat No.1, against payment of Rs.36.25 lakh and on execution of sale deed for 200 shares towards her 50% share ;
>
> 3) The Purchaser agrees to pay Rs.36.25 lakh on behalf of Vendor to Mr.Probal Ray in terms of City Civil Court's order dated 14/10/2003 against possession of portion 1/B of Flat No.1, and on execution of sale deed for balance 200 shares towards 50% share of Mr.Probal Ray."

25. From the aforesaid facts, it is clear that the suit flat belonged to the Plaintiff and Defendant No.1 in equal shares. It is also admitted that the suit flat is a dwelling unit. In view thereof, but for the letter dated 13.6.2006, each of the co-owners i.e. the Plaintiff and Defendant No.1 are entitled to sell only their respective undivided half share in the suit flat and neither of them would have had the authority to sell the undivided half share of the

other. The agreement dated 17.1.2007 would therefore have created no right whatsoever in favour of Defendant No.2 in respect of the Plaintiff's undivided half share in the flat. Moreover, the purchaser would not be entitled to possession of any portion of the suit flat in view of the judgment of the Supreme Court in the case of *Dorab Cawasji Warden vs. Coomisorab Warden & Others, (1990) 2 SCC 117*.

26. However, in the facts and circumstances of the present case, I am not inclined to pass a drastic order directing Defendant No.1 at the interlocutory stage to vacate the portion of the premises in his possession or even to appoint him as an agent of the Court Receiver requiring him to furnish security or to pay royalty.

. It is true that the Plaintiff is not a party to the said agreement dated 17.1.2007. Defendant No.2 could not therefore unilaterally have dealt with the Plaintiff's share. However, in view of the letter dated 13.6.2006, it cannot be said with any degree or certainty that the Plaintiff did not permit Defendant No.1 to hold herself out to third parties that Defendant No.1 was entitled to act on his behalf. Indeed the letter dated 13.6.2006 does give the

impression that all that the Plaintiff wanted was a sum of Rs.37,50,000/- and if that was paid the sale may be effected. It is not the Plaintiff's case that he even withdrew the letter dated 13.6.2006. I cannot fault Defendant No.2 at least at the interlocutory stage for having entered into the agreement dated 17.1.2007 by acting on the letter dated 13.6.2006. The least that must be said in favour of the Defendants is that the true scope of this letter and its effect thereof on the rights of third parties who acted thereon and have altered their position to their detriment can be established only at the trial of the suit.

27. Admittedly, Defendant No.1 in view of the alleged harassment to her by the Plaintiff and his wife, has received her 50% share of the consideration and has put Defendant No.2 in possession of that portion of the flat which came to her pursuant to the aforesaid order of this Court dated 7.6.2006 albeit at the interlocutory stage.

28. However, it is necessary to protect the rights of both the parties pending and hearing and final disposal of the suit. In the circumstances, both the Notices of Motion are disposed of by

following order:-

i). The parties shall continue to remain in use and occupation of the portions of the suit flat presently in their occupation and possession.

ii). All the parties are restrained by an order and injunction from disposing of, alienating, encumbering, creating any third party right, title and/or interest in, to, upon or in respect of the suit flat or any portion thereof.

iii). The outgoings in respect of the said flat and any dues payable to the society or to any statutory authority shall be paid by the Plaintiff and Defendant no.2 in equal shares. Liberty to apply in this regard in case of difficulty.

iv). Neither party shall be entitled to use the said premises for commercial purposes.